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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HUEY MEI LIN,

Plaintiff and Appellant,

v.

CITY OF GARDENA,

Defendant and Respondent.

B210914

(Los Angeles County
Super. Ct. No. BC382296)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James Chalfant, Judge. Affirmed.

Huey Mei Lin, in pro. per., for Plaintiff and Appellant.

Best Best & Krieger, Edward W. Lee, Christopher M. Pisano, Mancy Pendergrass
for Defendant and Respondent.

Appellant Huey Mei Lin (Lin) wants to build a residence on real property she owns. Lin complains that the Building Department of respondent City of Gardena (the City) erred in treating as lapsed a demolition permit it had issued and in refusing to issue her a construction permit. Rather than appeal the Building Department's decision to the City Council, as required under the Gardena Municipal Code, Lin filed the present writ of mandate action to compel the City to issue the permits. However, she failed to exhaust her administrative remedies and does not come within the futility exception to the exhaustion doctrine.

Thus, the trial court properly sustained, without leave to amend, her third amended petition for a writ of mandate. As the attorney for the City observed when the demurrer was sustained, Lin should "go through the very simple step of starting over and applying for a demolition permit."

FACTUAL AND PROCEDURAL SUMMARY

As alleged in the third amended petition for a writ of mandate, in January of 2006, Lin bought a small home in the City. She sought to demolish it and build a new two-story home on the site. Lin applied for a demolition permit from the City Building Department as an owner-builder, and the City promptly issued the demolition permit. The permit specified the starting date as April 21, 2006, and the completion date as June 30, 2006.

After obtaining the permit, Lin commenced demolition. However, over a year later, in April of 2007, the Building Department advised Lin that the demolition permit had lapsed. Ed Jafari, a building official with the City's Community Development Department, sent a letter to Lin confirming that the demolition permit had lapsed because she had not done any work on the property in over 180 days, in violation of the Gardena Municipal Code. Apparently, Lin had difficulty getting Southern California Edison (SCE) to remove a utility service line and a meter from the property, which caused a substantial delay. Jafari also advised Lin and her friend, Edward Zakharia, that Lin had violated the owner-builder provisions of the City's Municipal Code because Zakharia

was not a member of Lin's household, and yet he had admitted to working on the project.¹

In response to the City's decision to deem the demolition permit lapsed and to refuse to inspect the property, Zakharia complained to several City officials. He complained to Jafari, to the City's Community Development Director (Kathy Ikari), and to the City Manager (Mitch Lansdell). The thrust of Zakharia's complaint was that the demolition had continued through the year despite the delay with SCE, and thus he believed there was no basis for the City to deem the demolition permit lapsed.

In May of 2007, Zakharia sent a letter to Ikari regarding his inability to obtain a certificate of payment of developer fees from the Los Angeles Unified School District (LAUSD). The LAUSD would not process the application without a completed demolition inspection card from the City. Ikari advised Zakharia that the building inspector reported that the demolition permit could not be finalized because all the demolition had not been completed. The demolition was not completed because the perimeter foundation had not been removed, some concrete piers had been left within the perimeter, and the sewer had not been capped the required distance from the property line.

Two weeks later, Zakharia wrote another letter to Ikari, again asking for the demolition inspection card to take to the LAUSD. Ikari promptly explained in an e-mail to Zakharia that the City could not issue a demolition inspection card because the demolition had not yet been finalized.

Starting in August of 2007, Zakharia sent Ikari several letters, inquiring about the issuance of a construction permit. In response, Ikari explained to Zakharia that the City could not issue a construction permit when there were unresolved issues regarding the demolition permit. After Zakharia sent several more letters to Ikari, Jafari sent a letter to Zakharia explaining that the City would not issue a construction permit until he renewed the lapsed demolition permit and could fulfill all the other requirements for a construction

¹ Zakharia (a licensed contractor) was formerly an appellant in this case, but his appeal was dismissed because of his prior status as a vexatious litigant.

permit. Zakharia disagreed with this decision and wrote several additional letters to Ikari complaining about the decision.

Lin did not apply to renew the lapsed demolition permit. Nor did Lin file an appeal to the City Council, although the City's Municipal Code contains administrative procedures for appealing in writing to the City Council "any administrative decision made by any official of the city" by filing a timely written notice of such appeal with the City Clerk.

In September of 2007, Lin filed a tort claim for damages with the City Clerk, claiming damages in excess of \$25,000 for allegedly unnecessary and intentional delay in issuing a construction permit. The City rejected the claim. Lin then filed a complaint for damages against the City, alleging unnecessary and intentional delay in issuing a construction permit. Soon thereafter, Lin filed a petition for a writ of mandate to compel the City to issue a construction permit. Lin did not allege in the petition that she had exhausted administrative remedies or that she should be excused from doing so because of the futility exception to the exhaustion requirement. The City demurred to the complaint and the petition on the ground, among others, that Lin had failed to exhaust administrative remedies.

Before the hearing on the City's demurrer, Lin filed a first amended petition (but not a first amended complaint). The first amended petition alleged that she did not have to exhaust her administrative remedies because the City's appeal process was allegedly permissive. Thereafter, the parties stipulated and the trial court agreed that Lin could file a second amended petition. In the second amended petition, Lin again alleged that she did not have to comply with the City's administrative appeals process because it was supposedly permissive.

The City demurred to the second amended petition, urging in part that Lin had not exhausted her administrative remedies. The trial court issued a tentative ruling sustaining the City's demurrer without leave to amend, stating that Lin had failed to allege exhaustion of administrative remedies and that the 30-day limitations period for exhaustion had expired long before the original writ petition had been filed. The trial

court further observed that the City's administrative appeals process was not permissive and was a prerequisite for filing a writ petition. The trial court thus found that the second amended petition had failed to state a claim.

Lin then requested leave to amend so that she could plead facts "to argue the position that administrative review would [have been] futile." The trial court granted Lin leave to show facts to satisfy the futility exception to the exhaustion requirement.

Thereafter, Lin and Zakharia filed a third amended petition for a writ of mandate. Again, Lin and Zakharia asserted that they were not required to exhaust administrative remedies because the City's administrative appellate process was purportedly permissive, although the court had rejected that contention at the prior demurrer hearing. They also alleged that they had exhausted all available avenues because they had met with all levels of the City's staff and had applied to all levels of the City's government. However, they did not allege any facts to suggest that Lin had met with City Council members, or that the City Council had somehow prejudged an appeal of her permits.

The trial court sustained without leave to amend the City's demurrer to the third amended petition. It did so because Lin and Zakharia could not satisfy the exhaustion requirement, and they failed to allege facts sufficient to establish futility. Specifically, the trial court stated that Lin did not allege facts to meet the test of futility, as there was no evidence in the record that the City Council had expressed any view on the merits of Lin's case to the extent that it had prejudged the application. The trial court also remarked that Zakharia did not even have standing to be in the case.

In dismissing the third amended petition, the trial court recommended that Lin simply apply for a new demolition permit. It also noted that she had "gone through" two attorneys and wasted a lot of time. In urging the court to impose sanctions on Lin, the attorney for the City similarly remarked, "And rather than go through the very simple step of starting over and applying for a demolition permit, they have pushed this issue. They have gone through two attorneys on their own, and they have cost the City a lot of money." The court stated it had initially considered imposing a sanction on Lin in the

amount of \$2,000, but that it decided not to do so because she had amended the petition factually and at least had addressed the issue of futility.

The trial court entered a judgment of dismissal in favor of the City. Lin appeals.

DISCUSSION

The City's Municipal Code provides that if a building permit is denied, suspended, or revoked, the aggrieved party may appeal in writing to the City Council. The appeal is accomplished by filing a written notice of such appeal with the City Clerk within 14 days after the receipt of written notice of the action on the permit, but in no event later than 30 days after the date of the action complained of. There is no dispute that Lin did not appeal to the City Council the denial of the permits by the Building Department. On appeal she contends that she was not required to exhaust her administrative remedies by appealing to the City Council because it would have been futile to have done so.

It is well settled that where an administrative remedy is available by statute, a party must first seek relief from the administrative body and exhaust that remedy before seeking judicial relief. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) Exhaustion of an administrative remedy is a prerequisite to judicial review, even if the administrative remedy is couched in permissive language. (*Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 713-714.)

The futility doctrine is a ““narrow exception to the general rule”” of exhaustion of administrative remedies, and this exception is difficult to establish. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 (*Sea & Sage*)). A petitioner may not rely on speculation, but must offer solid, objective evidence to illustrate the futility of an available administrative remedy. (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1130.) A petitioner must “““positively state that the [agency] has declared *what its ruling will be in a particular case.*””” (*Sea & Sage, supra*, 34 Cal.3d at p. 418.) Moreover, the mere fact that an agency's governing body favors a particular outcome or project as a matter of legislative policy is not enough to demonstrate how the body would act on a particular project for purposes of the futility exception. (*Ibid.*)

In the present case, Lin’s third amended petition alleged that she “complied with each and every demand made by [the City] and believes that under these circumstances an appeal would be futile.” Lin essentially just speculated that an administrative appeal would have been futile. Lin did not allege, for example, any specific remarks made by members of the City Council. Nor did she allege in the third amended petition that the City Council had positively stated how it would have ruled on her appeal, had she bothered to present an appeal. Such a dearth of facts falls short of the specifics necessary to support a claim of the futility exception to the exhaustion requirement.

Lin asserts in her opening brief that an administrative appeal would have been futile because the City Manager supposedly knew of the conflict between her and the Building Department, and also because the City Attorney advises the City Council and had signed the letter rejecting Lin’s tort claim. Lin speculates that an appeal to the City Council would have been futile because the members “knew about” her permit issues from discussions in closed sessions, from the City Manager, and from her unsuccessful tort claim and court case.

However, Lin did not allege such facts in her third amended petition. Lin never alleged any facts in her third amended petition suggesting that the City Council was aware of this issue and aware of the Building Department’s decision, let alone facts to establish that the City Council had prejudged an administrative appeal. Even accepting the belated assertion in Lin’s opening brief that the City Council members “knew about” her permit issues, there is still no factual basis from which to conclude that they actually had *prejudged* the issues.

Lin’s mere subjective belief that an administrative appeal to the City Council would have been futile, had she pursued it, is insufficient to establish the futility exception. Lin had four chances to plead the futility exception, but she simply could not do so. Accordingly, the trial court did not abuse its broad discretion in sustaining the demurrer to Lin’s third amended petition without leave to amend. (See *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.)

Finally, the City requests—as it did before the trial court—that sanctions should be imposed against Lin. The City urges that the appeal is frivolous, and that attorney fees are warranted because the appeal was not taken in good faith. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a).) In the exercise of our discretion, we deny the motion to impose sanctions.

DISPOSITION

The judgment is affirmed. The City’s motion to impose sanctions is denied.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.